

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

**AMERICAN ORDNANCE, LLC
Employer**

and

Case 26-RC-8402

**INTERNATIONAL GUARDS UNION OF AMERICA
Petitioner**

**REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

The Employer, American Ordnance, LLC, is a government contractor that operates an ammunition plant in Milan, Tennessee. The Petitioner, International Guards Union of America, filed a petition with the National Labor Relations Board under §9(c) of the National Labor Relations Act seeking to represent the 35 security officers employed by the Employer at this facility.

The only issue raised at hearing is whether 18 of the security officers, referred to as Force Protection officers, are appropriately included in the unit as they are funded under a separate contract from the other 17 security officers, referred to as American Ordnance or AO officers. The Petitioner contends that all security officers perform the same work and should be included in the unit. Though the Employer stated at hearing and in its brief that it takes no position whether the Force Protection officers should be included, it asserts in its brief that their “unique temporary status” suggests they would be ineligible to be in the proposed voting unit.

Following a hearing before a hearing officer, the Employer filed a brief with me. I have considered the evidence adduced during the hearing and the arguments advanced by the parties. I have concluded that the Force Protection officers share a sufficient community of interest with the AO officers to warrant their inclusion in the petitioned-for unit. I reject the Employer's arguments that the Force Protection officers should be excluded from the unit because they are temporary employees or lack a community of interest. As more fully set forth below, I am directing an election in a unit comprised of all 35 security officers employed by the Employer.

To provide a context for my discussion of the issues and my conclusions, I will first provide an overview of the Employer's operations and security functions. Second, I will compare the terms and conditions of employment between the AO officers and the Force Protection officers. Finally, I will present the facts and reasoning that support my conclusions on this issue and address the arguments made to the contrary.

I. OVERVIEW OF THE EMPLOYER'S OPERATIONS AND SECURITY FUNCTIONS

The Employer is an Army contractor that operates the Milan Army Ammunition Plant, referred to as MAAP, located on about 22,000 acres in Milan, Tennessee. The Employer employs about 600 employees in loading, assembling, and packing ammunitions of various types.

The Employer employs 35 security officers that secure MAAP. These officers perform two basic functions: post and patrol. The post officers are stationed at 4 outer gates and 10 inner gates and are responsible for identifying people entering the facility, random vehicle searches, and checking for prohibited items. Patrol officers perform roving patrols of the facility checking

buildings and vehicles, responding to alarms and other emergencies, and providing assistance to visitors.

The security officers are provided pursuant to two different contracts between the Employer and the Army. Seventeen of the security officers are provided pursuant to a facilities-use agreement that permits the Employer to occupy MAAP, but requires the Employer to provide a specified number of security guards, regardless of the amount of ammunition the Employer produces. The Army does not reimburse the Employer for the costs of these guards. Rather, the Army pays the Employer for the ammunition it produces. The Employer and the Army have been parties to a series of facilities-use agreements, the most recent of which is effective through December 2006.

The other 18 security officers are provided pursuant to a Force Protection contract the Employer and Army entered into a couple of weeks after September 11, 2001. Before September 11, the AO officers were the only security officers at the facility. After September 11, the Army required additional security at the facility and agreed to pay the Employer for 18 additional security officers on a cost plus fixed-fee basis.¹ The Employer immediately filled these positions and informed these officers that their employment was indefinite. The Force Protection contract has been extended several times. Some of the contract extensions were for three months and some were for six months. The current Force Protection agreement was entered into October 1, 2003 and expires at the end of the Army's current fiscal year, September 30, 2004. When the Army decides to stop funding the Force Protection officers, the Employer will eliminate

¹ Although the Employer's facility security manager testified that she believed that under the contract the Army pays just cost and not cost plus, the first page of the contract shows the contract type is "Cost-Plus-Fixed Fee.

those positions. The Employer does not know whether the Army will continue the contract beyond September 30, 2004.

II. TERMS AND CONDITIONS OF EMPLOYMENT FOR SECURITY OFFICERS

The terms and conditions of employment for AO officers and Force Protection officers are very similar. Both the AO officers and Force Protection officers perform the post and patrol security functions at MAAP and have the same job descriptions. The Employer tries to assure that Force Protection officers are on the outer gates at all times, along with an AO security officer.

The starting salary for all officers is now \$10.17 per hour. Although initially the Force Protection officers had a starting rate of \$9.50 per hour, the Employer later requested the Army to provide additional benefits to the Force Protection officers which would bring their pay rate and benefits up to the level of the AO security officers. The Army agreed. All officers receive raises at 90-day intervals, topping out in salary in nine months. All officers receive the same fringe benefits.

All security officers work a 40-hour workweek and have the same supervision and work badges. Both the AO officers and Force Protection officers meet the same job qualifications and receive the same training from the Employer. The Employer interviews and selects the applicants to fill all open positions. When the Employer hires Force Protection officers, it tells them their job is temporary. Two employees hired as Force Protection employees became AO security officers upon the departure of two AO security officers. The Employer classifies the first 17 employees hired as AO security officers and classifies the last 18 hired as Force Protection security officers.

III. ANALYSIS

The only issue presented here is whether the Force Protection officers should be included in the unit. In arguing that the force protection officers should be excluded from the voting unit, the Employer makes two arguments. First, the Employer argues that Force Protection officers should be excluded because they are temporary employees. Second, the Employer argues that Force Protection officers should be excluded since the Employer has limited authority to bargain about important issues relating to their terms and conditions of employment.

A. Temporary Employees

While temporary employees are generally not eligible to vote in a representation election, the Board has held that temporary employees who are employed on the eligibility date and whose tenure of employment remains uncertain, are eligible to vote. MJM Studios of New York, Inc., 336 NLRB 1255, 1257 (2001), citing Personal Products Corp., 114 NLRB 959, 960 (1955); Boston Medical Center Corp., 330 NLRB 152, 166 (1999). Under this “date certain” test, an employee is not eligible if the prospect of the employee’s termination is sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired. MJM Studios of New York, supra; Boston Medical Center Corp., supra; St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992), citing Pen Mar Packaging Corp., 261 NLRB 874 (1982). Further, employees originally hired as temporary employees, retained beyond the original term of their employment, and subsequently employed for an indefinite period, are included in the unit. MJM Studios of New York, supra, citing Orchard Industries, 118 NLRB 798, 799 (1957).

Although the current contract between the Employer and the Army has a specific expiration date, September 30, 2004, I do *not* find that date is a “date certain” when the Force Protection officers will be terminated. Admittedly, the Employer informed the Force Protection Officers when they were hired that their position was “temporary” and will not exist if not funded by the Army. However, several Force Protection contracts prior to the current contract were extended. Although there is no guarantee that the Army will extend the current contract or enter into a new Force Protection contract for next fiscal year, there is also no evidence in the record that it will not do so. Moreover, two employees hired as Force Protection officers have already become AO officers and under the Employer’s system, others may do so before the Force Protection agreement is ultimately terminated.

Because the Force Protection contracts have already been extended several times since they began in September 2001 and there is no evidence they will not be extended after September 30, 2004, I find that the evidence is insufficient to establish a date certain for the termination of Force Protection officers or to dispel reasonable contemplation of continued employment beyond the term of the current contract. Accordingly, I find that the Force Protection officers’ tenure of employment remains uncertain and they should not be excluded as “temporary employees.” MJM Studios of New York, 336 NLRB at 1257 (evidence found insufficient to support a date certain for termination where the original six-month work period was extended by two months and employees were retained after that time period expired); Ameritech Communications, 297 NLRB 654 (1990) (employees hired on a temporary basis but retained beyond the original term of their employment and had not been given a definite date when their employment would end were properly included in a bargaining unit).

B. Employer Control Over the Employment Terms of Force Protection Officers

The Employer also argues that its contract with the Army limits its ability to negotiate about important terms and conditions of employment and that because of this limited ability, the Force Protection officers do not have a community of interest with the AO officers. The record does not support this contention. The AO officers and the Force Protection officers share a strong community of interest. They have common supervision, identical skills and functions, interchangeability and contact among one another, common work situs, the same general working conditions, and the same fringe benefits. Although the Army must approve the wages and benefits of the Force Protection officers, the record establishes that the Employer recommended and the Army agreed to make the wages and benefits of the Force Protection officers the same as those of the AO officers. In these circumstances, I find that notwithstanding the Force Protection contract with the Army, the Force Protection officers share a strong community of interest with the AO officers because there is no dispute that they work side-by-side with the AO officers, performing the same work, under the same supervision. MJM Studios of New York, supra and cases cited there.

To the extent that the Employer is suggesting that the Board should not exercise jurisdiction because of the terms of its contract with the Army, I also reject that contention. Such an argument is basically seeking to apply the test set forth in Res-Care, 280 NLRB 670 (1986) which the Board overruled in Management Training Corp., 317 NLRB 1355, 1358 (1995). The Board recently reaffirmed its decision not to return to the Res-Care test. Jacksonville Urban League, Inc., 340 NLRB No. 156, fn. 4 (2003). In addition, the Employer stipulated that the

Board has jurisdiction in this matter. Accordingly, I also find that the contract with the Army does not preclude the Board from asserting jurisdiction in this case.

I have considered the record as a whole, applicable Board law, and the arguments submitted by the parties. I find the appropriate unit for purposes of collective bargaining includes both the AO officers and the Force Protection officers employed by the Employer at MAAP.

IV. CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All hourly security officers, including both American Ordnance and Force Protection security officers, employed by the Employer at the Milan Army Ammunition Plant.

EXCLUDED: All other employees including clerical and supervisors² as defined by the Act.

² The parties stipulated that the following sergeant dispatchers have the authority to hire, fire, or to discipline, or to effectively recommend discipline, or transfer and are supervisors within the meaning

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Guards Union of America. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

of §2(11) of the Act: Nina Boyd, James Chandler, Robert McCaslin, and Eugene Wilbur. The parties stipulated, and I agree, that sergeant dispatchers should be excluded from any unit found appropriate.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 1407 Union Avenue, Suite 800, Memphis, TN 38104, on or before **February 2, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (901) 544-0008 or at (615) 736-7761. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 9, 2004**. The request may **not** be filed by facsimile.

Dated at Memphis, Tennessee, this 26th day of January 2004.

/S/

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